KETCHIKAN PUBLIC UTILITIES

IBLA 83-743 Decided March 20, 1984

Appeal from a decision of the Alaska State Office, Bureau of Land Management, approving lands for interim conveyance to Cape Fox Corporation. AA 6986-A, AA 6986-B.

Affirmed.

1. Alaska: Irrigation and Power -- Alaska Native Claims Settlement Act: Definitions: Federal Installation -- Alaska Native Claims Settlement Act: Definitions: Holding Agency -- Alaska Native Claims Settlement Act: Definitions: Public Lands: Generally -- Words and Phrases

   "Federal installation." The Beaver Falls Hydroelectric Power Project, which is operated by Ketchikan Public Utilities, a nonprofit division of the municipality of Ketchikan, pursuant to a license issued by the Federal Power Commission, is not a "Federal installation" and, therefore, the land occupied by the project is not being used in connection with the administration of any "Federal installation" within the meaning of 43 U.S.C. § 1602(e) (1976).

2. Alaska: Irrigation and Power -- Alaska Native Claims Settlement Act: Definitions: Federal Installation -- Alaska Native Claims Settlement Act: Definitions: Holding Agency -- Alaska Native Claims Settlement Act: Definitions: Public Lands: Generally

   A licensee of the Federal Power Commission, or its successor, the Federal Energy Regulatory Commission, is not an agent of the licensor so as to qualify the licensor as a "holding agency" within the meaning of 43 CFR 2655.0-5(a).

3. Alaska: Irrigation and Power -- Alaska Native Claims Settlement Act: Conveyances: Interim Conveyance -- Alaska Native Claims Settlement Act: Native Land Selections: National Forest Land -- Alaska Native Claims Settlement Act: Withdrawals and Reservations: Withdrawals for Native Selection: Generally -- Powersite Lands -- Withdrawals and Reservations: Powersites

Where Congress has provided in 16 U.S.C. § 818 (1982) that lands sought for a proposed power project shall from the date of the filing of an application therefor be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the Federal Power Commission or by Congress, and thereafter has further withdrawn these same lands for selection pursuant to section 16 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1615 (1976), BLM may properly convey such lands to a Native corporation selecting same, all else being regular.

4. Alaska: Irrigation and Power -- Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third-Party Interests -- Alaska Native Claims Settlement Act: Native Land Selections: Village Selections -- Powersite Lands

Federal land occupied by a municipally-operated utility pursuant to a license from the Federal Power Commission may be conveyed to a Native corporation selecting such land, subject to such license. Lands occupied by the utility are not excluded from the interim conveyance describing them.

APPEARANCES: Constance E. Brooks, Esq., Denver, Colorado, for appellant; Robert Babson, Esq., U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management; Peter Ellis, Esq., Ketchikan, Alaska, and Richard Anthony Baenen, Esq., Foster De Reitzes, Esq., and Lisa Frasco Ryan, Esq., Washington, D.C., for Cape Fox Corporation.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Ketchikan Public Utilities (KPU) appeals from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated May 13, 1983, approving lands for interim conveyance to Cape Fox Corporation (Cape Fox) for the Native village of Saxman. Among the lands described in BLM's decision for conveyance to Cape Fox is a 10-acre tract in sec. 8, T. 75 S., R. 92 E., Copper River meridian, in the Tongass National Forest. This tract is the site of the Beaver Falls Hydroelectric Power Project which is operated by

appellant pursuant to a license issued by the Federal Power Commission 1/ to the City of Ketchikan for project No. 1922. The license, issued on May 1, 1945, has a term of 50 years. 2/ The land in question is proposed for conveyance to Cape Fox subject to this license.

Under section 24 of the Federal Power Act, 16 U.S.C. § 818 (1982), the lands involved were, from the date appellant filed its proposed power project application therefor, "reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the [Federal Power] Commission or by Congress." On December 12, 1974, pursuant to section 16(b) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. §§ 1601, 1615(b) (1976), which withdrew certain lands for selection by, inter alia, the village corporation for the village of Saxman, Cape Fox filed selection applications AA-6986-A and AA-6986-B describing the project lands at issue.

Appellant maintains that the lands occupied by the project must be excluded from the interim conveyance because the project is a Federal installation and, accordingly, is not available for selection by Cape Fox. Alternatively, appellant contends that the license under which it operates the utility is a permanent valid existing right and, therefore, BLM should have excluded the lands occupied by the project.

Appellant directs our attention to the Federal Power Act, 16 U.S.C. §§ 791 through 828 (1982), in support of its first major argument that project No. 1922 is a Federal installation. If the project were, in fact, a

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1/ The authority of the Federal Power Commission to investigate, issue, transfer, renew, revoke, and enforce licenses and permits for the construction, operation, and maintenance of dams, water conduits, reservoirs, powerhouses, transmission lines, or other works for the development and improvement of navigation and for the development and utilization of power across, along, from, or in navigable waters under Part I of the Federal Power Act was transferred to the Federal Energy Regulatory Commission (FERC) pursuant to section 402 of the Department of Energy Organization Act, 42 U.S.C. § 7172 (Supp. IV 1980).

2/ Regulation 43 CFR 4.410(b) provides, inter alia, that any party who claims a property interest in land affected by a decision of Department officials relating to land selections under the Alaska Native Claims Settlement Act, as amended, shall have a right to appeal to the Board. Although we state, infra, that a license is not an entry leading to acquisition of title, and, indeed, is not traditionally regarded as an estate or interest in land, we hold that the standing regulation is satisfied by KPU's long occupancy of the subject lands pursuant to a license from the Federal Power Commission and its construction thereon of a power plant. See State of Alaska, Department of Transportation and Public Facilities, 67 IBLA 344 (1982). We note also that the U.S. Court of Appeals for the District of Columbia Circuit has held that licenses are interests in land. Wilderness Society v. Morton, 479 F.2d 842, 854 (D.C. Cir. 1973). These interests in land, the Court held, may not be the kind of interests in land that must be created in writing or recorded to be enforced, or the kind of interests in land for which compensation must be paid following condemnation for public use, but they are nevertheless interests in land.

Federal installation, it would not be part of the public lands as defined at 43 U.S.C. § 1602(e) (1976), and would not, therefore, have been available for selection by Cape Fox pursuant to 43 U.S.C. § 1615 (1976).

Appellant argues that 16 U.S.C. § 817 (1982), requiring a utility to obtain a license from the Federal Power Commission or its successor, the Federal Energy Regulatory Commission (FERC), for any project "across, along, or in any of the navigable waters of the United States, or upon any of the public lands or reservations of the United States" demonstrates that project No. 1922 is subject to the exclusive authority of FERC to regulate production of electrical power. Federal control and regulation of project No. 1922 is predicated on the project's impact on navigable waters and on the project's location on Federal land, appellant claims.

In appellant's view, the exclusivity and pervasiveness of Federal control of project No. 1922 compel the conclusion that project No. 1922 is a Federal installation. Appellant contends that it has operated the project since 1945 as the agent of FERC. This agency relationship is important to appellant because a Federal installation, by regulation, is held by a "holding agency." Regulation 43 CFR 2655.0-5(a) defines a "holding agency" as "any Federal agency claiming use of a tract of land subject to these regulations." (Emphasis supplied.) The State Director of Alaska is assigned the duty to determine what lands are Federal installations. 43 CFR 2655.3. This action is called a 3(e) determination because section 3(e) of ANCSA directs the Secretary to so act. 3/ An appeal by a holding agency from a decision of BLM on the grounds that BLM neglected to make a 3(e) determination must be remanded to BLM if the holding agency satisfies the Board that its claim is not frivolous. 43 CFR 2655.4. 4/

Appellant also charges that the power project withdrawal effected by 16 U.S.C. § 818 (1982) invalidates BLM's interim conveyance because the subject lands have never been formally restored to entry, and, therefore, remain reserved from disposal to Cape Fox. Appellant cites 16 U.S.C. § 818 as further providing that the Secretary shall declare such reserved lands open to

3/ That section reads:

"'Public lands' means all Federal lands and interests therein located in Alaska except: (1) the smallest practicable tract, as determined by the Secretary, enclosing land actually used in connection with the administration of any Federal installation, and (2) land selections of the State of Alaska which have been patented or tentatively approved under section 6(g) of the Alaska Statehood Act, as amended (72 Stat. 341, 77 Stat. 223), or identified for selection by the State prior to January 17, 1969." 43 U.S.C. § 1602(e) (1976).

4/ We note that a remand to BLM is unnecessary in this case because BLM did, in fact, determine that project No. 1922 is not a Federal installation. Although this determination does not appear in BLM's decision of May 13, 1983, appellant was informed by letter dated Aug. 24, 1981, that BLM regarded project No. 1922 as entirely under license to the City of Ketchikan and, hence, not a Federal installation within the meaning of section 3(e). See also letter of same date from the Associate Director, BLM, to the Mayors of the City of Ketchikan and the Ketchikan Gateway Borough to the same effect.

location, entry, or selection only if FERC determines that the reserved lands will not be injured or destroyed for the purpose of power development by such action. No such determination has been made, KPU contends. To maintain that ANCSA impliedly repealed the reservation overlooks, in appellant's view, section 28 of the Federal Power Act, 16 U.S.C. § 822 (1982), stating that no alteration, amendment, or repeal of the Act shall affect any license issued thereunder. An implied repeal is not favored, KPU argues, and such a repeal would jeopardize the sole source of electrical power for the residents of Revillagigedo Island.

[1] Although there is considerable Federal control of project No. 1922, we agree with BLM that the project is not a Federal installation, and thus, the land being occupied by the project is not "land actually used in connection with the administration of any Federal installation" within the meaning of 43 U.S.C. § 1602(e) (1976). In so holding, we acknowledge appellant's argument that authorization of the project is within the exclusive jurisdiction of FERC, Federal Power Commission v. Oregon, 349 U.S. 435 (1955), and that FERC approval is required before KPU may make any substantial, non-emergency alterations to its project works, 16 U.S.C. § 803 (1982). We note also, however, the existence of certain State controls, cited by Cape Fox, such as the State's requirement that KPU obtain a certificate of public convenience and necessity before operating as a public utility in the State. AS § 42.05.221. Alaska statutes also authorize the Alaska Public Utilities Commission to condition the grant of a certificate by requiring a utility to provide a service not contemplated by the utility. AS § 42.05.241. Moreover, we cannot ignore the charge by Cape Fox, unrebutted by appellant, that KPU is a municipally-owned utility. As set forth by the Supreme Court in First Iowa Hydro-Electric Cooperative v. Federal Power Commission, 328 U.S. 152, 175-76 reh'g denied, 328 U.S. 879 (1946), there is, in fact, a dual system of regulation, both state and Federal, established by the Federal Power Act.

[2] The issue whether a licensee of FPC, or its successor, FERC, such as KPU, is also an agent of FPC or FERC has been decided by the U.S. Supreme Court. In Broad River Power Co. v. Query, 288 U.S. 178, 180 (1933), the Court addressed the question whether a licensee could claim to be exempt from state tax:

> It is apparent, however, that the complainant in generating and selling power is not acting as an agent for the Government. It acts with the Government's permission, and while it may be said to have received a privilege from the Government, it is not a privilege to be exercised on behalf of the Government. The tax is not upon the exertion of, and cannot be said to burden, any governmental function.

The privilege that the Court speaks of is the license issued by the Government to the utility. In this case, KPU, as a licensee, is not an agent of the licensor so as to qualify the licensor as a "holding agency" within the meaning of 43 CFR 2655.0-5(a).

[3] Appellant's argument that the withdrawal effected by 16 U.S.C. § 818 (1982) invalidates BLM's interim conveyance is answered by the statute itself. The statute provides that lands of the United States included in

a proposed power project shall "from the date of the filing of an application thereof be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the Commission or by Congress." (Emphasis supplied.) We hold that in enacting section 16 of ANCSA, 43 U.S.C. § 1615 (1976), Congress authorized Cape Fox to select lands occupied by KPU, subject to valid existing rights. Section 16(b) required Cape Fox to select an area equal to 23,040 acres, which area "must include the township or townships in which all or part of the [village of Saxman] is located, plus, to the extent necessary, withdrawn lands from the townships that are contiguous to or corner on such townships." The selection by Cape Fox of lands occupied by KPU was in accordance with section 16(b). Congressional approval of the disposal of the instant lands is apparent from section 16, and the reservation effected by 16 U.S.C. § 818 (1982) is no impediment to the interim conveyance under appeal.

Appellant's second major argument on appeal is the contention that its license for project No. 1922 is a permanent valid existing right that requires BLM to exclude the lands occupied by the project from the interim conveyance. Appellant charges that BLM incorrectly identified its license as a "temporary" valid existing right under section 14(g) of ANCSA. Section 14(g), 43 U.S.C. § 1613(g) (1976), provides:

> All conveyances made pursuant to this chapter shall be subject to valid existing rights. Where, prior to patent of any land or minerals under this chapter, a lease, contract, permit, right-of-way, or easement (including a lease issued under section 6(g) of the Alaska Statehood Act) has been issued for the surface or minerals covered under such patent, the patent shall contain provisions making it subject to the lease, contract, permit, right-of-way, or easement, and the right of the lessee, contractee, permittee, or grantee to the complete enjoyment of all rights, privileges, and benefits thereby granted to him. Upon issuance of the patent, the patentee shall succeed and become entitled to any and all interests of the State or the United States as lessor, contractor, permitter, or grantor, in any such leases, contracts, permits, rights-of-way, or easements covering the estate patented * * *. The administration of such lease, contract, permit, right-of-way, or easement shall continue to be by the State or the United States, unless the agency responsible for administration waives administration.

KPU argues that its high level of capital investment in the utility and its preference for license renewal entitle it to greater protection than is accorded section 14(g) rights. The rights protected in section 14(g) are described by appellant as "limited" or "transient." It argues that, as such, section 14(g) rights do not serve the important public interests involved here.

Appellant seeks the exclusion of the subject lands from the conveyance rather than their transfer to Cape Fox subject to valid existing rights. This argument is addressed by regulation 43 CFR 2650.3-1(a), which provides:

> [A]ll conveyances issued under [ANCSA] shall exclude any lawful entries or entries which have been perfected under, or are being

> maintained in compliance with, laws leading to the acquisition of title, but shall include land subject to valid existing rights of a temporary or limited nature such as those created by leases (including leases under section 6(g) of the Alaska Statehood Act) contracts, permits, rights-of-way, or easements.

On page 1 of the conveyance, BLM states that the lands conveyed to Cape Fox do not include any lawful entry perfected under or being maintained in compliance with laws leading to acquisition of title. Appellant's license is expressly identified in the conveyance at page 3:

> The grant of the above-described lands shall be subject to:
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> * * * * *
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> 2. Valid existing rights therein, if any, including but not limited to those created by any lease (including a lease issued under Sec. 6(g) of the Alaska Statehood Act of July 7, 1958 (48 U.S.C. Ch. 2, Sec. 6(g))), contract, permit, right-of-way, or easement, and the right of the lessee, contractee, permittee, or grantee to the complete enjoyment of all rights, privileges, and benefits thereby granted to him. * * *
> * * * * *
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> 4. The following third-party interest, created and identified by the Federal Power Commission, as provided by Sec. 14(g) of the Alaska Native Claims Settlement Act of December 18, 1971 (43 U.S.C. 1601, 1613):
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> A license for power project No. 1922, as amended, issued to the City of Ketchikan, May 1, 1945, for a period of fifty years, subject to the provisions of the Federal Power Act of June 19, 1928, as amended (41 Stat. 1075; 16 U.S.C. 818) for the construction, operation, and maintenance of certain project works necessary or convenient for the development, transmission and utilization of power upon the lands;

Appellant charges that the Secretary's rigid distinction between valid existing rights that lead to conveyance of title and those rights that are temporary fails to recognize the directive of Congress that all valid existing rights are to be protected. Particularly troublesome to appellant is that provision in section 14(g) of ANCSA stating that the patentee (Cape Fox) shall succeed and become entitled to any and all interests of the State or the United States as lessor, contractor, permitter, or grantor, in any such leases, contracts, permits, rights-of-way, or easements covering the estate patented. Appellant finds it difficult to imagine that Congress, having retained exclusive regulatory control over the production of power on the Nation's navigable waters and on the Federal lands, ever intended that a Native corporation should succeed to the interests of the United States in a Federal power license.

[4] Although the conveyance describes appellant's license as a valid existing right under section 14(g), a cursory reading of section 14(g) reveals that Congress did not specifically mention a license in its list of rights preserved. Regulation 43 CFR 2650.3-1(a), quoted above, expands the possibilities of valid existing rights protected by section 14(g) by inclusion of the phrase "such as those created by leases * * * contracts, permits, rights-of-way and easements." (Emphasis supplied.) Indeed, Secretarial Order 3029, 43 FR 55287 (Nov. 27, 1978), 5/ a memorandum from Solicitor Krulitz adopted by Secretary Andrus, approves an expansive reading of this regulation. Addressing the question whether rights leading to acquisition of title may include state created rights as well as federally created rights, the Solicitor wrote: "Second, I do not believe that listing of the rights to be protected was intended to be limiting, but rather was ejusdem generis. The regulation already quoted (43 CFR 2650.3-1(a)) precedes its list with 'such as those created by * * *,' indicating clearly that the list is not exhaustive." Our interpretation of section 14(g) to include a license issued by FERC is based upon a similar reading of the regulation.

To exclude the lands occupied by the project, as appellant urges, on the grounds that its interest is one leading to the acquisition of title is to ignore the nature of a license. The grant of a license is a privilege from the sovereign. Alabama Power Co. v. Federal Power Commission, 128 F.2d 280, 288-89 (D.C. Cir.), cert. denied, 317 U.S. 652 (1942). A license in respect to realty is an authority to do an act on the realty of another without possessing any estate in the land, and is to be distinguished from a grant or demise creating some interest in the realty. Radke v. Union Pacific Railroad, 138 Colo. 189, 334 P.2d 1077, 1086-87 (1959). Absent use of its power of eminent domain, the possible application of section 14(c) of ANCSA, 43 U.S.C. § 1613(c) (1976), or an outright sale or exchange by the owners of the fee, KPU may never acquire title to the lands at issue. Indeed, appellant's license for project No. 1922 contemplates that the utility may occupy non-Federal lands. License No. 1922, articles I and VI, May 1, 1945.

As to appellant's concern that Cape Fox may jeopardize KPU's continued service of electrical power to its customers, section 14(g) provides: "The administration of such lease, contract, permit, right-of-way, or easement shall continue to be by the State or the United States, unless the agency responsible for administration waives administration." 43 U.S.C. § 1613(g) (1976). If, as we held above, a license is to be included among those valid existing rights named in section 14(g), it follows that the administration of the subject license will continue to be handled by the United States through FERC. Thus, KPU's fears that Cape Fox will become the licensor are unfounded.

So long as there exists a jurisdictional basis for FERC to act, the issue of license renewal in 1995 will be decided by FERC. If as appellant alleges, FERC jurisdiction is presently based, in part, on the project's effect on navigable waters over which Congress retains jurisdiction under its authority to regulate commerce with foreign nations and among the several states, such jurisdiction will be unaffected by the conveyance at issue. In 16 U.S.C. § 817 (1982), Congress provided assurance that a license to operate

5/ See also 601 DM 2, Appendix 2, amending S.O. 3029.

a project across, along, or in any of the navigable waters of the United States would be issued, if at all, in accordance with the Federal Power Act:

> It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States * * * except under and in accordance with the terms of * * * a license granted pursuant to this chapter.

Although we acknowledge that uncertainties do exist as to the terms and conditions of any license renewal that may occur in 1995, such uncertainties are present even in the absence of the conveyance at issue. License renewal is addressed at 16 U.S.C. § 808 (1982):

> (a) If the United States does not, at the expiration of the original license, exercise its right to take over, maintain, and operate any project or projects of the licensee, as provided in section 807 of this title, the commission is authorized to issue a new license to the original licensee upon such terms and conditions as may be authorized or required under the then existing laws and regulations, or to issue a new lease under said terms and conditions to a new licensee * * *. [Emphasis supplied.]

Appellant can only speculate whether its opportunities for license renewal, and the terms and conditions thereof, are jeopardized by the proposed conveyance to Cape Fox. BLM properly included the lands in question in the interim conveyance subject to KPU's license.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Alaska State Office is affirmed.

Bruce R. Harris
Administrative Judge

We concur:

Will A. Irwin
Administrative Judge

R. W. Mullen
Administrative Judge